

L9n2GriC kjc

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

20 Cr. 15 (PKC)

5 VIRGIL GRIFFITH,

6 Defendant.

7 -----x

Conference

8 September 23, 2021
9 3:10 p.m.

10 Before:

11 HON. P. KEVIN CASTEL,

12 District Judge

13
14 APPEARANCES

15 AUDREY STRAUSS

16 United States Attorney for the
Southern District of New York

17 BY: KIMBERLY J. RAVENER

KYLE A. WIRSHBA

18 Assistant United States Attorneys

19 BAKER MARQUART, LLP

20 Attorneys for Defendant

21 BY: BRIAN E. KLEIN

KERI CURTIS AXEL

22 KOBRE & KIM, LLP

23 Attorneys for Defendant

24 BY: SEAN S. BUCKLEY

L9n2GriC kjc

(Case called)

THE DEPUTY CLERK: For the government.

MR. WIRSHBA: Good afternoon, your Honor. Kyle Wirshba on behalf of the government. I'm joined at counsel table by AUSA Kimberly Ravener.

THE COURT: Good afternoon.

And for the defendant.

MR. KLEIN: Good afternoon, your Honor. Brian Klein, with Keri Axel and Sean Buckley. We have a signed waiver for our client's appearance that we presented to the Court. I believe your Honor has it with him.

THE COURT: I do. I do have a signed waiver, and you discussed his right to be present.

MR. KLEIN: Yes, we did, your Honor.

THE COURT: I want to note for the record that we are still trying to have him participate by phone, but it does not appear that that will be possible, so I appreciate it.

Any objection to my proceeding on the basis of the written waiver?

MR. WIRSHBA: Not from the government, your Honor.

THE COURT: All right. So I have the defendant's letter, and what I propose to do is find out what the government has to say and then give you, Mr. Klein, an opportunity to respond. So go ahead.

MR. WIRSHBA: Your Honor, the government has reviewed

L9n2GriC kjc

1 the defendant's letter and does not believe that an adjournment
2 in this case is appropriate.

3 The government has been producing exhibits on a
4 rolling basis, and has done its best to get those exhibits into
5 the hands of the defense with plenty of time to examine those
6 exhibits and to make any objections and meet and confer with
7 the government with respect to those exhibits. Most of those
8 exhibits were given to the defendant two weeks before the trial
9 date, and they continue to come in to the defense on a rolling
10 basis thereafter.

11 The government does not believe that there is a basis
12 for an adjournment and, at this point, even for those exhibits
13 that came to the defense two weeks before trial, we have not
14 discussed a single objection to any of those exhibits from the
15 defense despite being on the phone with them on multiple
16 occasions.

17 With respect to the OFAC documents, your Honor, OFAC
18 conducted --

19 THE COURT: Let me --

20 MR. WIRSHBA: Yes, your Honor.

21 THE COURT: -- back up.

22 MR. WIRSHBA: Of course.

23 THE COURT: There was an agreement between the parties
24 that the government would make trial exhibits available on a
25 rolling-production basis, to be completed by September 17, and

L9n2GriC kjc

1 this was an agreement on August 27. Is that right so far?

2 MR. WIRSHBA: No, your Honor.

3 THE COURT: Okay.

4 MR. WIRSHBA: The government did not agree to have its
5 production of exhibits completed by September 27 and never
6 would have done so. September 17, excuse me. The government
7 agreed to, on a rolling basis, try to get the defendant as many
8 exhibits as it could, noting that it would try to do so by that
9 date, and that it would provide an exhibit list on September
10 17, which the government did. The government then made another
11 production --

12 THE COURT: I wasn't there, so I don't know. What
13 does the exhibit list tell the reader? I wouldn't know.

14 MR. WIRSHBA: The exhibit list told the reader all of
15 the exhibits that had been produced --

16 THE COURT: No, no, no.

17 MR. WIRSHBA: -- to that date.

18 THE COURT: No, no, no. My question wasn't specific
19 enough. What bibliographic or other identifying information
20 about the document would be reflected on this so-called exhibit
21 list.

22 MR. WIRSHBA: Understood, your Honor.

23 It was an exhibit number that was associated with the
24 produced exhibit, a short description of the exhibit --

25 THE COURT: When you say -- so it would be Government

L9n2GriC kjc

1 Exhibit 1, and then it would reflect, what, a production
2 number?

3 MR. WIRSHBA: Both the description and a production
4 number.

5 THE COURT: Okay.

6 MR. WIRSHBA: But, your Honor, the one that we
7 produced on the 17th, just to be extremely clear, reflected
8 only the exhibits that were produced to that date, and the
9 government produced more exhibits a day thereafter and has been
10 doing so on a rolling basis.

11 THE COURT: Whoa, whoa. Just hang on now.

12 MR. WIRSHBA: Yes, your Honor.

13 THE COURT: So you said to me, we said we were going
14 to give an exhibit list, and we gave the exhibit list, but the
15 exhibit list did not include all of the exhibits. So what was
16 not on the exhibit list provided on or before September 17?

17 MR. WIRSHBA: The exhibits that were provided to the
18 defendant thereafter. There was --

19 THE COURT: Well, when you say the exhibits, do you
20 mean that the document was first produced or its status as a
21 possible trial exhibit?

22 MR. WIRSHBA: The latter, your Honor.

23 THE COURT: All right. And how many such documents
24 were identified after September 17, 2021.

25 MR. WIRSHBA: So on the evening of September 18,

L9n2GriC kjc

1 shortly after midnight, the government produced another hundred
2 exhibits after producing 180 exhibits on September 13, in
3 advance of that September 17 --

4 THE COURT: No, no. Listen. Right now, so you
5 produced 130 before and you produced 100 after, is that what
6 you are telling me.

7 MR. WIRSHBA: 180 before, your Honor.

8 THE COURT: Right.

9 MR. WIRSHBA: And we produced approximately 100 on
10 that date after, and then we have had some rolling exhibits
11 with much smaller numbers after that.

12 THE COURT: Like what numbers?

13 MR. WIRSHBA: On September 20, 13 exhibits; on the
14 21st, eight exhibits. The government has, throughout its
15 discussion with the defense, reserved the right to continue to
16 mark exhibits on a rolling basis and said that we would do our
17 absolute best to get them out as quickly as possible. The
18 government hasn't been withholding exhibits that are already
19 marked. And everything, as your Honor noted, that is being
20 produced to the defendant as an exhibit was already produced to
21 the defendant unless we have also made a discovery production
22 pointing out that it was new, and we haven't heard any problems
23 in that regard, and we have an exhibit list that we continue to
24 update for the defense.

25 THE COURT: That sounded like a big trap door there.

L9n2GriC kjc

1 Unless it was identified as something new. Well, how many
2 hundreds were that?

3 MR. WIRSHBA: I don't have an exact figure, your
4 Honor.

5 THE COURT: Well, I'm not -- listen, you know what the
6 purpose of today's session is.

7 MR. WIRSHBA: Of course.

8 THE COURT: I expect you to answer. I didn't get a
9 letter, so that's why you are here.

10 (Counsel confer)

11 MR. WIRSHBA: Your Honor, if I may have a brief
12 moment?

13 THE COURT: Sure.

14 (Counsel confer)

15 MR. WIRSHBA: Your Honor, it's my recollection that
16 the only thing we produced for the first time that were marked
17 were screenshots of publicly available websites.

18 THE COURT: How many of them were there?

19 MR. WIRSHBA: Fewer than 20, your Honor.

20 THE COURT: All right. And when were they produced.

21 MR. WIRSHBA: I don't have an exact date for you, your
22 Honor.

23 THE COURT: Well, how about an approximate date?

24 MR. WIRSHBA: Of course. It was around the 18th.

25 THE COURT: Okay. All right. So around 24 hours

L9n2GriC kjc

1 after it was due.

2 MR. WIRSHBA: Your Honor, the government never agreed
3 to a deadline for exhibits and would not have done so.

4 THE COURT: Okay. Well, what did you agree to do by
5 September 17? It sounds like maybe you are telling me you
6 didn't agree to do anything.

7 MR. WIRSHBA: We agreed to provide an exhibit list and
8 we agreed to try to get the defendant a substantial number of
9 exhibits.

10 THE COURT: Whoa, whoa, whoa. But the defendant knew
11 or should have known when you said "an exhibit list," you
12 didn't mean "the exhibit list," you meant "an exhibit list,"
13 like, "here is an exhibit list. That is not the exhibit list
14 of the exhibits at trial, it's some of the exhibits at trial,
15 but it's just a list."

16 MR. WIRSHBA: It was a list of everything that the
17 government had marked to that point, your Honor.

18 A VOICE: This is MCC.

19 THE COURT: One second.

20 A VOICE: I have Mr. Virgil.

21 THE DEPUTY CLERK: Okay.

22 A VOICE: Okay. I am putting him on the phone right
23 now.

24 THE DEPUTY CLERK: Okay.

25 THE DEFENDANT: Hello?

L9n2GriC kjc

1 THE COURT: Hey, Mr. Griffith. This is the judge. We
2 are here in the proceeding.

3 We thank you for your signed waiver of appearance.

4 I am hearing the government's response to your
5 lawyers' letter of September 22; and, in the courtroom, in
6 addition to the government lawyers, your lawyers are present as
7 well.

8 So if Mr. Wirshba wishes to continue, you may.

9 MR. WIRSHBA: Thank you, your Honor.

10 In our communication with the defense about the
11 exhibit list, we made it clear that this was not a complete
12 exhibit list; that we were making a good-faith effort to mark
13 exhibits on a rolling basis and that we would continue to
14 supplement it. There was no question --

15 THE COURT: Did you do this in an e-mail or how did
16 you do this?

17 MR. WIRSHBA: Yes, your Honor. We did it in an
18 e-mail.

19 THE COURT: Do you have the e-mail with you?

20 MR. WIRSHBA: I do not.

21 THE COURT: You don't have the e-mail with you.

22 MR. BUCKLEY: Your Honor, we have the e-mail.

23 THE COURT: What did you think you were coming to
24 court for today?

25 MR. WIRSHBA: Your Honor, we were coming to court to

L9n2GriC kjc

1 discuss whether or not there would be an adjournment. The
2 government has continued to operate in good faith in producing
3 the exhibits that it has marked, and we were prepared to answer
4 any questions about that.

5 THE COURT: But not to respond to the letter of
6 September 22. That was not something you were prepared to do.

7 MR. WIRSHBA: No, your Honor. That is what we were
8 prepared to do.

9 THE COURT: Okay. So Mr. Buckley, what does the
10 e-mail say?

11 MR. BUCKLEY: Yes, your Honor. Just to clarify a
12 couple of points made by Mr. Wirshba, and I will read this into
13 the record, so if the court reporter -- if I go too fast,
14 please just let me know, and I will slow down accordingly.

15 Your Honor, on August 27, we e-mailed the government
16 and said, "In connection with our various pretrial filings, we
17 intend to ask the Court to direct the government to provide the
18 defense with a preliminary exhibit list and the actual exhibits
19 and transcripts the government intends to offer at trial by no
20 later than September 10, 2021, as that information is necessary
21 for us to prepare for trial and to determine if we have
22 objections to specific evidence or exhibits outside of what
23 you have outlined in your motion *in limine*. If necessary, we
24 are prepared to file a motion requesting this relief, but
25 would prefer not to do so if you are amenable to this

L9n2GriC kjc

1 schedule."

2 Later that same day, on August 27, 2021, AUSA Ravener
3 writes back, "We will, of course, work out with you a timeline
4 for preliminary exhibit lists and copies of exhibits which we
5 would reserve the right to alter or amend and see no need for a
6 motion on that subject. We would propose September 17, which
7 would be ten days in advance of trial. We plan to make a
8 rolling production of exhibits, as we have done with 3500
9 materials, which would commence before that date."

10 She goes on to say, "Of course, you are already in
11 possession of substantial notice on this subject in light of
12 our own motion practice and detailed provision of citations to
13 you at your request." That last point was addressed at the
14 pretrial conference, as well as in our motion *in limine*, where
15 we flagged the difficulty of lodging objections to specific
16 exhibits because none had yet been provided.

17 Thereafter, on August 27, the same day, we respond,
18 "Thank you, Kim. We appreciate that. Do you have a sense of
19 when you would commence the rolling production?"

20 We then followed up -- we, the defense -- again, on
21 August 29, and were told that the production would commence
22 ASAP.

23 As noted in our motion *in limine*, it was our
24 understanding, based upon the initial outreach and the
25 proposition we had presented to the government, that September

L9n2GriC kjc

1 17 would be the date by which they would present us with not
2 only an exhibit list of their trial exhibits, but also the
3 actual exhibits. While we recognize that the government
4 reserved the right to amend or supplement that list, as we
5 noted in our letter yesterday, producing over 100 additional
6 exhibits after the September 17 date, we don't believe is a
7 fair characterization of amending or supplementing the exhibit
8 list.

9 THE COURT: Okay. Thank you.

10 All right? Anything else, Mr. Wirshba.

11 MR. WIRSHBA: Your Honor, I just want to emphasize
12 that the e-mail we sent did say that it was preliminary.
13 That's how --

14 THE COURT: I heard that.

15 MR. WIRSHBA: Okay. Understood, your Honor.

16 THE COURT: All right. Now there was something else
17 you wanted to discuss in the letter, in responding to the
18 letter?

19 MR. WIRSHBA: Yes, your Honor.

20 With respect to the OFAC documents that were produced
21 earlier this week, the government made another request of OFAC,
22 after its requests previously that are well known to the Court,
23 and received documents back for a particular witness for which
24 the government expects to have Jencks Act and *Giglio*
25 obligations. We received documents back from that search that

L9n2GriC kjc

1 we had not previously received, and we produced them as
2 appropriate to satisfy our Jencks Act and *Giglio* applications.

3 At this point we understand that the search that we
4 have asked OFAC to complete is final and that they have
5 completed that search, and we have produced whatever is
6 appropriate. This is in addition to the productions that the
7 government has made of OFAC material on July 29; August 18;
8 August 26; May 7; May 28 of 2021; June 22, 2021; and August 20,
9 2021. And we contest the idea that there is any *Brady* in these
10 materials. We were producing them as Jencks Act material for a
11 witness.

12 THE COURT: So let me see if I can translate this.

13 You have produced 3500 material on an OFAC -- one or
14 more -- one OFAC witness, is that right?

15 MR. WIRSHBA: That is correct, your Honor.

16 THE COURT: Okay. All right.

17 And you did that by the date that you had committed to
18 make 3500 material available?

19 MR. WIRSHBA: We did that on the day that we received
20 the documents. So the government was not in possession of
21 those documents. The day we received them, we turned them
22 around as 3500 material.

23 THE COURT: Okay. And when was that that you turned
24 them around?

25 MR. WIRSHBA: The first production was 13 documents on

L9n2GriC kjc

1 Tuesday, and then yesterday we provide an additional four
2 documents. With respect to each of those, we received them
3 that same day.

4 THE COURT: Okay. Anything else?

5 MR. WIRSHBA: No, your Honor.

6 THE COURT: Okay. Mr. Klein or Mr. Buckley.

7 MR. KLEIN: Yes, your Honor. We were going to divide
8 this up a little bit.

9 Your Honor, we expected to have the exhibits and the
10 exhibit list on the 17th. We followed up. Just to be clear,
11 Mr. Buckley read some of the e-mail traffic. We didn't want to
12 involve the Court. We were trying not to involved the Court.
13 We thought we had a deal with the government. We followed up
14 repeatedly in advance of the 17th because they had produced no
15 exhibits until the 14th. And again, that was 1:00 in the
16 morning the night before our pretrial conference. And we were,
17 frankly, concerned about this problem, and we were following up
18 with them persistently.

19 And then, as you can see in our letter, they dumped a
20 ton of exhibits on us well after that deadline, the exhibits
21 they should have had ready, your Honor. We asked for the
22 transcripts. We received the transcripts after that deadline.
23 We don't know what exhibits are left out there and at this
24 point it has severely prejudiced our client, our ability to
25 prepare for this trial, and so we would ask for a brief

L9n2GriC kjc

1 continuance of one week.

2 THE COURT: Thank you, Mr. Klein.

3 Okay.

4 MR. BUCKLEY: Did you --

5 THE COURT: Mr. Buckley?

6 MR. BUCKLEY: Did you want me to address the OFAC
7 disclosure issue?

8 THE COURT: Well, I invited either Mr. Klein or you to
9 say your piece, like I invited the government to say its piece.

10 MR. BUCKLEY: Certainly. May I address the Court?

11 THE COURT: Yes.

12 MR. BUCKLEY: With respect to the OFAC materials, what
13 we find particularly concerning, and as outlined in our letter,
14 is while the government is characterizing them as 3500 material
15 for a single witness that was produced timely, that, we submit,
16 is inaccurate. The government had been directed, in response
17 to a motion to compel and this Court's order, to conduct a
18 search of OFAC's files for materials that include this 3500
19 material. They produced similar materials related to other
20 witnesses, but those materials did not go into the level of
21 detail as these materials. They did not include some of the
22 participants in these conversations. And it brings into
23 question the integrity of the search that was performed by
24 OFAC, because these late-disclosed materials include the case
25 caption. They reference U.S. v. Griffith. They also reference

L9n2GriC kjc

1 Griffith. We don't understand how it is that these materials
2 were not captured in their search pursuant to our motion to
3 compel and this Court's order. And the government represented
4 to us, I believe it was on June 22 -- I don't have the exact
5 date in front of me -- that it had completed its search of
6 these materials. That's clearly not the case.

7 These materials raise substantial questions that
8 underlie or underlay the original motion to compel. They go to
9 question about notice with respect to Mr. Griffith and his
10 willfulness. We have been asked not to go into great detail
11 about the communications because they are internal
12 communications and are not public. We certainly can go into
13 more detail, but there are specific references to the adequacy
14 of notice provided by prior enforcement actions which were not
15 public, as well as the adequacy of notice under the C.F.R.

16 Given that Mr. Griffith, as your Honor has held, is
17 charged with a crime that requires a finding by the jury that
18 he willfully violated the law, we believe that it is fair game
19 to establish that there was not adequate notice out there
20 regarding the conduct at issue here. And the discussion
21 regarding the adequacy of notice related to other
22 investigations that pertained to similar conduct. So not only
23 is it late, but it suggests that their original search was
24 incomplete. And had we been provided with this material at the
25 appropriate time, I think we would have filed additional motion

L9n2GriC kjc

1 practice and likely sought additional discovery. But to get
2 this on Tuesday night of this week and then a follow-on
3 production last night, again, severely hampers our ability to
4 advance these arguments.

5 THE COURT: Thank you, Mr. Buckley.

6 I will give the government a brief opportunity to
7 respond to Mr. Buckley's point.

8 MR. WIRSHBA: Yes, your Honor.

9 The government, first of all, produced these materials
10 when we received them, as noted. At this point we understand
11 that OFAC completed its search that they were asked to do in
12 connection with your Honor's order on the motion to compel, the
13 order back in December, and has completed the search of its
14 files with respect to this particular witness for any Jencks
15 Act or *Giglio* information, and we have made appropriate
16 productions based on what OFAC has given us and based on the
17 search that we have conducted.

18 Although we did produce materials --

19 THE COURT: Well, let me ask you. I don't know. I am
20 trying to learn this. So I have my order on December 22, 2020.
21 Were these documents recently produced? Were they in existence
22 at the time of that order? Were they covered by the order or
23 are they something that weren't even in existence then or tell
24 me?

25 MR. WIRSHBA: The --

L9n2GriC kjc

1 THE COURT: Should they have been produced in response
2 to the December 22 order?

3 MR. WIRSHBA: We don't believe so, your Honor. Your
4 Honor asked us to conduct a *Brady* review, and we do not view
5 these documents as responsive to that *Brady* review. The
6 government did produce documents, in an abundance of caution,
7 as it was going through what was produced by OFAC. To answer
8 your very specific question about whether or not these
9 documents were in existence, they were in existence, but they
10 were not provided by OFAC to the government at that time. They
11 were provided on Tuesday and yesterday.

12 MR. BUCKLEY: Your Honor, if I may respond?

13 THE COURT: The silence was not intended to be just an
14 opportunity for somebody who wanted to fill in, but go ahead,
15 Mr. Buckley. Because I may remain silent after that, and it's
16 not going to be an invitation for somebody to fill in, so go
17 ahead.

18 MR. BUCKLEY: Understood, your Honor. Just the point
19 I was going to make is on July 1, 2021, the government
20 represented, "As previously indicated, we understand that
21 nothing was withheld from the review on privilege grounds.
22 OFAC searched its searchable holdings, including e-mails,
23 digital chats, and network folders, and separately contacted
24 each custodian to ensure all non-email records were collected."
25 This recent production, in short, establishes that that

L9n2GriC kjc

1 procedure was not followed and identifies other individuals
2 that we think the files need to be examined.

3 Thank you for --

4 THE COURT: That's fine.

5 MR. WIRSHBA: Your Honor?

6 THE COURT: Oh geez.

7 MR. WIRSHBA: I'm so, so sorry, your Honor. I truly
8 am. But there is one thing that Mr. Buckley said that I don't
9 want to leave on the record, because it is something that the
10 government knows that I would be remiss if I didn't bring it to
11 the Court's attention with respect to the government's earlier
12 representation. And so I'm very, very sorry. May I speak to
13 that one issue?

14 THE COURT: Go right ahead.

15 MR. WIRSHBA: Thank you, your Honor.

16 Mr. Buckley is right that we said that it was the
17 government's understanding that we searched those things. I
18 wanted to bring to the Court's attention that we learned this
19 morning that it was not the case that the network files were
20 actually searched at OFAC. And so I did not want to leave that
21 on the record, because I didn't want your Honor to have a
22 misimpression about that. I am very, very sorry for
23 interrupting.

24 THE COURT: Mr. Buckley, do you want to respond?

25 MR. BUCKLEY: No, your Honor, but that goes to the

L9n2GriC kjc

1 heart of our concern here.

2 THE COURT: All right. The defendant has moved for a
3 continuance of trial due to late production of trial exhibits
4 in violation of a commitment the government made to the defense
5 and what it describes as seriously belated disclosure of OFAC
6 documents in violation of the Court's December 20, 2020, order.

7 Let me begin with discussing trial exhibits. In this
8 district, there is -- first of all, in the Federal Rules of
9 Criminal Procedure, the local rules of this Court, individual
10 practices of this Court, and in the orders of this Court no
11 rule on the production of trial exhibits by the government or
12 by the defendant. There are certain exceptions to information
13 regarding experts, certain notices that are required by law,
14 but not a rule with regard to exhibits or witnesses.

15 What this court Does typically, and did in this case
16 specifically, is it sets a schedule for the government to
17 identify 404(b)-type evidence to make motions *in limine*, for
18 the defense to make its motions *in limine*. The Court does not,
19 as it reads 18 U.S.C. 3500, it does not have the authority to
20 order the government to produce 3500 material before a witness
21 completes their direct testimony; but, as is customary in this
22 district, the Court will often get a commitment from the
23 government with regard to the production of 3500 material.

24 As has been candidly pointed out, there was no request
25 made to this Court, no order of this Court with regard to

L9n2GriC kjc

1 exhibits. This is not some foundational rule, as there are
2 foundational rules in civil litigation. There is a pretrial
3 order, and that pretrial order has to list exhibits and
4 witnesses. There is no such comparable document in criminal
5 practice in this district or before this judge.

6 There is a distinction between sandbagging somebody
7 with something that was not produced in discovery and the
8 marking of exhibits and identifying that which will be offered.
9 Nevertheless, the government and the defense is not free to
10 break commitments. It is very common in this district and in
11 this Court that attorneys will talk and will come to
12 arrangements. Sometimes they come to arrangements about when
13 they will tell the other side who they are calling the next day
14 as a witness or on a given day as a witness. They might decide
15 24 hours or they might decide some other rule or they might not
16 have any arrangement. But these are arrangements between
17 counsel that ought to be followed.

18 From what I have seen here, the government was careful
19 in saying this is going to be a preliminary list, we reserve
20 the right to add, modify, supplement. That does not give the
21 government a license to play a game with anyone or anyone to
22 play a game in the proceedings before the Court. I don't see
23 that there was gamesmanship here. It sounds like the -- well,
24 I will use the accurate term, the chaos that precedes the
25 immediate days leading up to a trial, the intense preparation,

L9n2GriC kjc

1 the review and re-review of things. So I don't find there was
2 anything wrong. It was suboptimal, but not inappropriate or
3 wrong in terms of documents that were previously produced that
4 were late identified as trial exhibits.

5 The website material is more of a concern, but it has
6 been represented these were all public websites and that is the
7 case, and that is going to be something very easy for the
8 defense to either formulate a trial objection or to meet it in
9 its case or the like.

10 With regard to the OFAC material, this is a bit of a
11 tale of two versions. The defense says this is *Brady* material
12 and it should have been produced earlier, was called for by the
13 December 22 order. The government says it is not *Brady*
14 material and it is 3500 material and they produced it at the
15 time they received it. They acknowledge that it was not
16 searched for and it was in existence at the time of the
17 December 22 order. They maintain it is not *Brady* material.

18 As my reading of the case law indicates, that
19 sometimes with regard to *Brady* issues, they are best assessed
20 in the rearview mirror; that to determine what is helpful to
21 the defense, exculpatory, useful to the defense, and any degree
22 of prejudice, is not always something that a trial judge can
23 determine on his or her own. That is why the monkey is always
24 on the government's back. The government has the obligation
25 with regard to *Brady* material. So it is certainly an issue

L9n2GriC kjc

1 that is fair for the defense to raise, but at this stage of the
2 game, thankfully, they had the material.

3 Now, let me talk about an adjournment of the trial.
4 This transcript may, I hope, some day, if it is ever read, it
5 is read on a sunny day with face masks and the like a quaint
6 artifact, but right now we are still under pandemic conditions.
7 We resumed jury trials on a limited basis less than a year ago,
8 and we have a protocol for how these trials are set. And in or
9 about May of 2021, judges were permitted to put in for trial
10 dates in the third quarter of 2021, so during the second
11 quarter, late in the second quarter.

12 Trial dates are not determined by who gets their
13 request in first or anything arbitrary like that. There is a
14 protocol, and protocol turns on whether the defendant is
15 detained or not detained, how old the case is, and that is
16 determined after all requests for the quarter are put in. And
17 in June I was able to advise the parties of a trial date, I
18 think initially it was on the 20th, and I was able to adjust it
19 to the 27th. That was at the time.

20 Right now, I have looked at the calendar, and on every
21 day, beginning October 4 through and including December 15,
22 2021, there are cases scheduled for jury selection pursuant to
23 the protocol. There is no date that this can be adjourned to
24 in this quarter. This is in part because other trials are
25 slated for jury selection and we only have the capability as a

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1 Court of picking one jury in a day for the entire court. In
2 days gone by, in days that I hope will return, many juries
3 could be selected on a given day. We are blessed and we are
4 fortunate and we have had over 60 jury trials starting with
5 September 29, 2020. But that is because we have a protocol.

6 I cannot adjourn this trial one week. I have a
7 detained defendant. It would be into 2022. Nor do I conclude
8 that it is necessary in this case. So the application for an
9 adjournment is denied.

10 Is there anything further from the government?

11 MR. WIRSHBA: Nothing from the government, your Honor.

12 THE COURT: Anything further from the defendant?

13 MR. KLEIN: One second, your Honor.

14 (Counsel confer)

15 MR. KLEIN: Your Honor, I had a question, your Honor.
16 To be clear, we had asked, since there is no availability
17 between now and December, if we said January 2022, is that a
18 possibility?

19 THE COURT: The word "possibility" is all it is,
20 because at some point in November I would put in for a trial
21 date in the first quarter of 2022. No guarantee of when that
22 trial would be. But the reality is, I have ruled on the
23 request for an adjournment. Thank you.

24 Anything else?

25 MR. KLEIN: No, your Honor.

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1 THE COURT: Thank you. I will see you on Monday
2 morning. Thank you.

3 MS. RAVENER: Thank you, your Honor.

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